

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

ANTHONY DEAN CONLEY,)	
)	
Petitioner,)	
)	CIVIL ACTION
v.)	
)	No. 04-3144-KHV
DAVID McKUNE, et al.,)	
)	
Respondents.)	
_____)	

MEMORANDUM AND ORDER

On August 7, 1998, the District Court of Sedgwick County, Kansas, convicted Anthony Dean Conley of first degree murder in violation of K.S.A. § 21-3401(a). Pursuant to 28 U.S.C. § 2254, plaintiff seeks a writ of habeas corpus. For reasons stated below, the Court denies the petition.

I. Procedural Background

On November 14, 1997, in the District Court of Sedgwick County, Kansas, the district attorney charged Conley with second degree murder in violation of K.S.A. § 21-3402(a). See Record, Vol. I at 91 in State v. Conley, Case No. 97 CR 2225 in the District Court of Sedgwick County, Kansas. On April 2, 1998, the District Attorney amended the charge to first degree murder in violation of K.S.A. § 21-3401(a). Id. at 96. On August 7, 1998, a jury found Conley guilty as charged. Record, Vol. II, at 299. On September 17, 1998, the court sentenced Conley to life in prison with no possibility of parole for 40 years, a “Hard 40” sentence. Id. at 327.

Conley appealed his conviction to the Kansas Supreme Court, arguing that (1) the trial court erred by admitting preliminary hearing testimony of Melissa Eckels after finding that she was unavailable to testify at trial; (2) the trial court committed clear error when it did not instruct the jury on informant testimony; (3)

the trial court abused its discretion by permitting the prosecutor's peremptory strikes; (4) the trial court erred in imposing a Hard 40 sentence; (5) the Hard 40 sentencing scheme is unconstitutional; and (6) the Hard 40 sentence denied Conley the right to a jury determination of facts to determine the sentencing range. See Brief of Appellant, State v. Conley, 270 Kan. 18, 11 P.3d 1147 (2000) (No. 82,380). On October 27, 2000, the Kansas Supreme Court affirmed, finding that the trial court did not err on any issues which Conley had raised and that he had no constitutional right to a jury for a Hard 40 determination. See State v. Conley, 270 Kan. 18, 11 P.3d 1147 (2000). On March 19, 2001, the United States Supreme Court denied Conley's petition for a writ of certiorari. Conley v. Kansas, 532 U.S. 932 (2001).

On October 16, 2001, Conley filed a state motion for post-conviction relief under K.S.A. § 60-1507. There, he asserted that (1) the complaint contained a constitutional defect; (2) the trial court violated his right to due process, to a fair trial and to confront and cross-examine his accuser; (3) the trial court erred by omitting critical elements in voir dire; (4) the trial court erred by not instructing on informant testimony; and (5) counsel provided ineffective assistance. On April 10, 2002, the district court denied relief, finding that Conley had raised or could have raised these issues on direct appeal, and that his allegations of ineffective assistance were conclusory or otherwise refuted by the motion, file and records. See Order Denying Relief Pursuant To K.S.A. 60-1507, Case No. 01 C 3193 in the District Court of Sedgwick County, Kansas. The court denied his claim that the complaint was defective because the law does not require notice of penalty provisions in the charging document. On December 24, 2003, the Kansas Court of Appeals affirmed the district court ruling. See Memorandum Opinion dated December 24, 2003 in Conley v. Kansas, Case No. 88,962. Conley did not seek review in the Kansas Supreme Court.

On May 10, 2004, Conley filed a petition for writ of habeas corpus in this Court, asserting that (1) the complaint contained a jurisdictional defect; (2) the affidavit which supported his arrest warrant contained false statements; (3) counsel was ineffective; and (4) the trial court violated his right to confront witnesses against him.

II. Evidence At Trial

The state court held a five-day criminal jury trial beginning August 3, 1998. The victim, Nicholas Armstrong, sustained five wounds from four gunshots. Tr. Vol. 2 at 214-22. Early on September 27, 1995, Joe Noble, an employee of McCormack-Payton Atlas Van Lines, found Armstrong's body in an alley. Id. at 151. The coroner testified that Armstrong died from a close-range shot to the forehead. Id. at 214.

Prior to trial, the trial court determined that Melissa Eckels was unavailable to testify at trial. It therefore allowed the prosecution to read her testimony from the preliminary hearing. Eckels, who lived in Arizona, had recently given birth by caesarean section and her doctor had not released her to travel. Tr. Vol. 3 at 67. According to her testimony at the preliminary hearing, Armstrong shared an apartment with defendant and Alex Travis Scott. Id. at 66. Eckels (who is Conley's cousin and Scott's sister) stated that she played Nintendo in the apartment the evening of September 26, 1995. While there, she noticed a gun on the television.¹ Id. at 68. Eckels went home around 10:30 p.m. Defendant had left the apartment approximately 30 minutes earlier with Armstrong and Scott. Id. at 69. Eckels testified that after they left,

¹ In her preliminary hearing testimony, Eckels referred to the item on the television as an "object" and stated that she "wouldn't say it was exactly a gun." Tr. Vol. 3 at 68. Eckels acknowledged, however, that in talking with investigators before the preliminary hearing, she had identified the object as a gun. Id.

she did not see the gun on the television. The next day Scott gave Eckels a CD player, a VCR and a bike all of which had belonged to Armstrong to pawn. Id. at 71.

Marilyn Noel, a resident of an apartment complex near McCormack-Payton Atlas Van Lines, testified that on September 26, 1995, she heard five or six shots around 10:45 p.m. Tr. Vol. 2 at 140. Noel heard two or three shots, a pause, two or three more shots, then one final shot. Id. at 141. Gretchen Macy-Toro, an acquaintance of Armstrong's, testified that at 10:50 p.m., she saw Armstrong's Bronco drive past her apartment. Id. at 163. She thought it odd that Armstrong did not stop, that the windows were rolled up and that no loud music was playing. Id. at 164.

On September 28, 1995, police found Armstrong's Bronco about four miles from his apartment. A bullet had pierced the driver's side door from inside the vehicle. Tr. Vol. 3 at 19. Investigators did not find any blood on the vehicle. Id. at 24-25. Investigators found 17 fingerprints, two of which belonged to Armstrong. Id. at 29. None of the prints belonged to Conley. Id.

On January 23, 1996, near Coffeyville, Kansas, police stopped a vehicle in which Conley and Scott were riding. Id. at 107. The police found a loaded .38 caliber handgun in the cargo area of the vehicle and a .45 caliber handgun behind the driver's seat. Id. at 108. Ballistic tests showed that the .38 handgun had fired the bullets which were found in Armstrong's neck and leg. Id. at 18. The gun had also fired the shell casings found near Armstrong's body. Id. at 21.

In February of 1997, Conley was in prison on another charge.² Id. at 113. During this imprisonment, he shared a cell with Larry Luckey. Id. Luckey testified that Conley admitted that he had

² The record does not clearly reflect when Conley went to prison. Larry Luckey, another prisoner, stated that he and Conley shared a cell in February of 1997.

shot Armstrong with a .38 until he ran out of bullets and that Scott had then shot Armstrong in the head with a .22. Id. at 124-25.

Conley testified at trial. He stated that he had been home alone, watching a movie, the night of the murder. Tr. Vol. 4 at 132-33. He claimed that Armstrong stopped by the apartment to make a few telephone calls and left by himself between 10:30 p.m. and 11:30 p.m. Id. at 132. Conley ordered pizza from Domino's Pizza at 12:24 a.m. Id. at 56. Conley testified that he knew nothing about the murder. Id. at 141.

III. Legal Standards

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L 104-32, 110 Stat. 1214 (1996) (codified in relevant part at 28 U.S.C. § 2254), governs the Court's review. See Paxton v. Ward, 199 F.3d 1197, 1204 (10th Cir. 1999) (AEDPA applies to habeas petitions filed after April 24, 1996, regardless of date of criminal trial forming basis of conviction). A state prisoner cannot petition for federal habeas corpus relief "unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is satisfied if the federal issue has been properly presented to the highest state court, either by direct review of the conviction or in a postconviction attack. Dever v. Kan. State Penitentiary, 36 F.3d 1531, 1534 (10th Cir. 1994).

Under Section 2254, as amended by AEDPA, the Court may not issue a writ of habeas corpus with respect to any claim which the state court adjudicated on the merits unless that adjudication resulted in a decision:

- (1) . . . that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) . . . that was based on an unreasonable determination of the facts in light of the

evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). The Court may issue a writ of habeas corpus under the “contrary to” clause only if (1) the state court arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law, or (2) the state court decided a case differently than the Supreme Court on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405-06 (2000). Under the “unreasonable application” clause, the Court may grant habeas relief if the state court “correctly identifies the governing legal rule but applies it unreasonably to the facts of a prisoner’s case.” Id. at 407-08. The Court may not issue a writ simply because it concludes in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; the application must have been objectively unreasonable. Id. at 409-11.

IV. Analysis

Conley raises four issues in his habeas petition: (1) the complaint contained a jurisdictional defect; (2) the affidavit which supported his arrest warrant contained false statements; (3) counsel was ineffective because counsel influenced him to testify and failed to conduct an adequate pretrial investigation, file a motion to dismiss on jurisdictional issues, seek a continuance when the trial court deemed one witness to be unavailable and request a motion hearing to suppress affidavit statements and untruths; and (4) the trial court violated his right to confront witnesses against him.

A. Jurisdictional Defect In Complaint

Conley first argues that the complaint was jurisdictionally defective because it charged him under K.S.A. § 21-3401(a), which does not carry any sentence, and that in sentencing, the district court relied

on critically essential elements not evidenced in the complaint.³ Conley first raised this issue in his state habeas appeal. The Kansas Court of Appeals denied his state habeas appeal, and the State argues that because Conley did not seek review by the Kansas Supreme Court, he has procedurally defaulted this claim.

The procedural default doctrine precludes federal habeas review of a claim that a state court has declined to consider due to petitioner's noncompliance with state procedural rules unless the petitioner can show (1) both cause and prejudice or (2) manifest injustice. Coleman v. Thompson, 501 U.S. 722, 749 (1991). In Coleman, the Supreme Court held that if "the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, petitioner's claims are procedurally defaulted for purposes of federal habeas regardless of the decision of the last state court to which petitioner actually presented his claims." 501 U.S. at 735 n.1; see also Dulin v. Cook, 957 F.2d 758, 759 (10th Cir. 1992) (petitioner's failure to properly present claims in state court constitutes procedural default for purposes of federal habeas review). Here, the Kansas Court of Appeals affirmed the denial of Conley's state habeas petition and Conley failed to seek timely review of that decision by the Kansas Supreme Court. See O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999). A return to state court would be futile at this point

³ K.S.A. § 21-3401(a) defines first degree murder as the killing of a human being intentionally and with premeditation. Conley contends that K.S.A. § 21-3401(a), which is the only statute cited in the complaint, does not set forth the penalty for murder or the aggravating factors which the court considers during sentencing. Conley argues that the complaint must contain "the legal stepping stone" to the Hard 40 sentence and that because statutes which set forth the penalty and aggravating factors were omitted from the complaint, the court lacked jurisdiction to act. Essentially, Conley argues that K.S.A. § 21-3401(a) provides no sentence for first degree murder and that the court cannot sentence him to prison because any time served would increase the maximum penalty set out in the complaint.

because the time for appeal has passed, and his claims are procedurally defaulted for purposes of federal habeas corpus review. See Watson v. New Mexico, 45 F.3d 385, 387 (10th Cir. 1995). Because Conley defaulted his claims, the Court cannot hear them unless he can show cause and prejudice or manifest injustice.

To show cause for the default, Conley must demonstrate that an objective, external impediment prevented him from timely filing his petition for review. Murray v. Carrier, 477 U.S. 478, 488 (1986). Conley offers no explanation for his failure to appeal this issue and therefore cannot show cause for his default.

Additionally, Conley does not show that a miscarriage of justice may result if the Court does not hear his claim. To make this showing, petitioner must demonstrate that a constitutional error has probably resulted in the conviction of one who is actually innocent. See Bousley v. United States, 523 U.S. 614, 623 (1998). Conley offers no evidence of actual innocence. Indeed, Conley does not even allege that he is actually innocent.

B. Supporting Affidavit

Conley next argues that the affidavit supporting his arrest warrant contained false statements, i.e. the affidavit named two individuals in possession of a weapon when three persons were actually present when police found the weapon. Conley first raised this issue in his state habeas appeal. The Kansas Court of Appeals affirmed the denial of Conley's state habeas petition. Conley offers no explanation for his failure to appeal this issue to the Kansas Supreme Court. For reasons stated above, the Court must deny Conley's petition because he has procedurally defaulted this issue.

C. Ineffective Assistance Of Counsel

Conley maintains that trial counsel provided ineffective assistance because he (1) improperly influenced Conley to testify; (2) did not thoroughly investigate the case before trial; (3) failed to file a motion to dismiss on jurisdictional issues; (4) failed to seek a continuance of trial when the court found that Eckels was unavailable; and (5) did not request a motion hearing to suppress affidavit statements and untruths. Conley first raised all of these issues in his state habeas petition, but he did not appeal the adverse rulings of the Kansas Court of Appeals.⁴ Therefore, Conley's claims are now procedurally barred. See Coleman, 501 U.S. at 732.

Here again, Conley offers no explanation for the failure to appeal his ineffective assistance claims to the Kansas Supreme Court. Furthermore, he offers no evidence that but for counsel's alleged errors, he would not have been found guilty. See Strickland v. Washington, 466 U.S. 668, 694 (1984). Because Conley cannot show cause and prejudice, the Court cannot hear his claims.

D. Right To Confrontation

Finally, Conley argues that the trial court violated his Sixth Amendment right to confrontation because he could not confront Eckels at trial. Conley argues that the state did not make a good faith effort or exercise due diligence to procure Eckels' appearance at trial.

Before trial, the trial court found that Eckels was unavailable to testify at trial. At trial, the court permitted the prosecution to read the transcript from her testimony at the preliminary hearing. On direct

⁴ Conley filed two motions pursuant to K.S.A. § 60-1507, which the district court consolidated. See Order Denying Relief Pursuant To K.S.A. 60-1507, Case No. 01 C 3193 in the District Court of Sedgwick County, Kansas. The records provided to this Court do not contain the second motion, and the Court relies on uncontested information in the State's appellate brief which shows that Conley raised these ineffective assistance arguments in the district court. See Brief of Appellee, Conley v. State (Nos. 01 C 3193 and 01 C 3442).

appeal, the Kansas Supreme Court rejected Conley's confrontation claim, stating as follows:

Here, Eckels had delivered a baby by caesarean section less than 3 weeks before trial. Her physician's notarized letter said Eckels "is medically unable to travel the week of 8/3-7/98." Moreover, Conley did not ask for a continuance. The facts do not show a lack of reasonable diligence on the part of the State, nor do they show bad faith. A reasonable person would agree with the district court's decision to declare Eckels unavailable as a witness.

State v. Conley, 270 Kan. 18, 11 P.3d 1147 (2000). The Kansas Supreme Court further found that Conley had an opportunity to cross-examine Eckels during the preliminary hearing. Id. The court noted that defense counsel's questions at the hearing showed awareness of inconsistencies in her statements. Id.

Although styled as one argument, defendant seems to make two separate constitutional arguments. First, Conley argues that the trial court violated his Sixth Amendment right to confront Eckels by denying him the right to cross-examine her at trial. Second, Conley argues that the trial court violated his right to a fair trial by admitting Eckels' testimony from the preliminary hearing without a proper foundation. Specifically, Conley argues that the notarized letter from Eckels' physician did not establish a proper foundation for admission of the testimony.

With respect to Conley's first argument, the Court notes that the Confrontation Clause does not guarantee criminal defendants an "absolute right to a face-to-face meeting with witnesses against them at trial." Maryland v. Craig, 497 U.S. 836, 844 (1990). While the prosecution must make a good faith effort to obtain a witness' presence at trial, the Supreme Court has found that the opportunity to cross-examine a witness at a preliminary hearing satisfies the Confrontation Clause if a witness was unavailable at trial and the statement bore adequate indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 65-66, 70 (1980). Here, the Kansas Supreme Court found that Eckels' unavailability occurred as a result of her medical condition,

not as a result of the prosecution's failure to exercise good faith or reasonable diligence in securing her presence. Furthermore, Conley had the opportunity to cross-examine her at his preliminary hearing. In finding that Eckels was unavailable, the Kansas Supreme Court did not unreasonably apply the law to Conley's case and thus it did not violate his constitutional rights. It had a sufficient basis to conclude that Eckels was unavailable, and Conley had a chance to cross-examine Eckels during her prior testimony.

With respect to Conley's second argument that Eckels should not have been excused on the basis of a notarized letter from her physician, federal habeas corpus relief does not lie for errors of state law. See Moore v. Marr, 254 F.3d 1235, 1246 (10th Cir. 2001). Conley's claim that the trial court abused its discretion by permitting introduction of testimony without proper foundation is a question of state law. Conley does not explain how the state court's ruling resulted in a fundamentally unfair trial, and he is not entitled to relief as to this claim.

The Court concludes that Conley's habeas petition does not establish any instance in which the state proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). Conley presents no grounds upon which habeas relief is warranted.

IT IS THEREFORE ORDERED that Conley's habeas petition be and hereby is **DENIED**.

Dated this 30th day of December, 2004 at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

